

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7441

No. 76-7441

UNITED STATES COURT OF APPEALS

For the Second Circuit

MARIA VALENTINO

Appellee

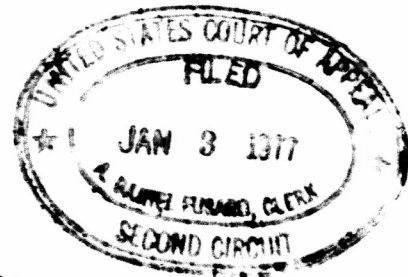
VS.

SWISS FONDUE POT, INC.

Appellant

On Appeal From The United States District
Court for the District of Vermont

APPELLANT'S BRIEF



W. Edson McKee
Attorney for Defendant-Appellant
McKee, Giuliani & Cleveland
94 Main Street
Montpelier, VT 05602

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES CITED	11
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
ARGUMENT I	3
<p>PLAINTIFF FAILED TO SHOW, THROUGH THE CIRCUMSTANTIAL EVIDENCE PRESENTED, THAT THE DEFENDANT'S NEGLIGENCE WAS THE MOST PROBABLE CAUSE OF HER INJURIES.</p>	
ARGUMENT II	6
<p>FOR THE JURY TO HAVE FOUND FOR THE PLAINTIFF IT WOULD HAVE HAD TO BASE AN INFERENCE UPON AN INFERENCE WHICH IS NOT PERMITTED.</p>	
ARGUMENT III	8
<p>THE DISTRICT COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE.</p>	
CONCLUSION	9

TABLE OF CASES AND AUTHORITIES CITED

<u>Ackerman v. Kogut</u> , 117 Vt. 40, 84 A. 2d. 131 (1951)	6
<u>Capello's Admr. v. Aero Mayflower Transit Co.</u> , 116 Vt. 64, 68 A 2d 913 (1949)	6
<u>Chumbler v. McClure</u> , 505 F 2d 489, (6th Cir. 1974)	3
<u>Crown Cork & Seal Co. v. Morton</u> , 417 F 2d 921 (6th Cir. 1969)	6
<u>Huestis v. Lapham</u> , 113 Vt. 191, 32 A 2d 115 (1943)	6
<u>Johnstone v. Bushnell</u> , 118 Vt. 162, 102 A 2d 334 (1954)	3
<u>McDonnell v. Montgomery Ward & Co.</u> , 121 Vt. 221, 154 A 2d 469 (1959)	3
<u>Milne v. Edson</u> , 116 Vt. 226, 73 A 2d 325 (1950)	6
<u>Moran v. Raymond Corp.</u> , 484 F 2d 1008, (7th Cir. 1973)	3
<u>Moskowitz v. Peariso</u> , 458 F 2d 240, (6th Cir. 1972)	3
<u>Poronto v. Sinnott</u> , 89 Vt. 479, 95 A 647 (1915)	6
<u>Upton v. Western Life Insurance Co.</u> , 492 F 2d 148 (6th Cir. 1974)	3
<u>Rivers v. State</u> , 133 Vt. 11, 328 A 2d 398 (1974)	3
<u>State v. Fox</u> , 123 Vt. 82, 181 A 2d 74 (1962)	6
<u>Wall v. A. N. Derringer Co.</u> , 119 Vt. 36, 117 A 2d 390 (1955)	8, 9
<u>Wellman Admr. v. Wales</u> , 97 Vt. 245, 122 A 659 (1923)	4, 5
30 American Jurisprudence 2d "Evidence" §1121 pp. 288-289	4
12 Vermont Statutes Annotated §1036	9

ISSUES PRESENTED FOR REVIEW

Does the record as a whole warrant that the Court should have granted the Defendant's Motion for a Directed Verdict at the end of the Plaintiff's case and its renewal at the close of the evidence?

STATEMENT OF THE CASE

This is a civil action on the complaint alleging negligence on the part of a restaurant owner for failing to maintain his premises in a safe condition for business invitees and/or to warn of a dangerous condition. The case was tried by jury, resulting in a verdict for the Plaintiff. In due course the Defendant filed a Motion for Judgment Notwithstanding the Verdict, which was denied.

STATEMENT OF FACTS

On July 22, 1974, Plaintiff, Maria Valentino, accompanied by her husband and another couple, dined at the Swiss Fondue Pot, a restaurant, located in Stowe, Vermont. Plaintiff and her party had eaten on the patio which is outside the main restaurant. (Transcript p. 92). At about 8:00 p.m., Plaintiff entered the main building and walked to the cashier's station and asked directions to the Ladies Room. (T. pp. 92 & 93). Plaintiff was informed that the Ladies Room was to her right and upstairs. (T. p. 93).

While Plaintiff had been to the restaurant several times before, she had never had occasion to go to the Ladies Room. (T. pp. 92 & 93). Upon receiving these directions Plaintiff turned to the right and fell. (T. p. 94).

Plaintiff was unable to state why she fell or what caused her to fall. (T. pp. 94, 115 & 117). Further, the evidence would indicate that Plaintiff never looked where she was walking but rather was looking ahead a distance to a second set of steps that had lights and caught her attention. (T. p. 116).

Plaintiff's husband, Andrea Valentino, testified that he was not present when Plaintiff fell, but was seated outside on the patio. (T. pp. 83 & 84). He testified that he heard a scream from within the building and went inside to see what had happened and found his wife lying near a riser or step. He went on to testify he did not look to see whether there were objects other than the riser over which Plaintiff may have fallen. (T. p. 137).

Mr. Valentino also testified that Plaintiff had suffered a fall about one year previously that had resulted in severe injury to her right ankle. (T. p. 64).

ARGUMENT I: PLAINTIFF FAILED TO SHOW, THROUGH THE CIRCUMSTANTIAL EVIDENCE PRESENTED, THAT, THE DEFENDANT'S NEGLIGENCE WAS THE MORE PROBABLE CAUSE OF HER INJURIES.

In the instant case, Plaintiff contends that she was injured when she tripped and fell over a step or riser located upon Defendant's premises. Plaintiff, as a business invitee had a right to expect the premises were safe and Defendant had a duty to warn of any known dangerous condition about the premises. Johnstone v. Bushnell, 118 Vt. 162, 102 A. 2d 334 (1954).

The issue presented here is whether or not the evidence presented by the Plaintiff on trial was sufficient to establish the proximate cause of her injuries was in fact the riser of the Defendant.

Plaintiff is a citizen of Canada and Defendant is a Vermont corporation. Jurisdiction in the District Court is based upon diversity. In a diversity case, state law controls on the issue of sufficiency of the evidence. Chumbler v. McClure, 505 F. 2d 489 (6th Cir. 1974), Upton v. Western Life Insurance Co., 492 F. 2d 148 (6th Cir. 1974), Moran v. Raymond Corp., 484 F. 2d 1008 (7th Cir. 1973), Moskowitz v. Peariso, 458 F. 2d 240 (6th Cir. 1972).

In Vermont, "the law of proximate cause calls for a causal connection between the act for which the defendant is claimed to be responsible and which is alleged to be negligent and the resulting flow of injurious consequences." Rivers v. State, 133 Vt. 11, 14, 328 A. 2d 398 (1974). "Liability for negligence does not establish until the fact of injury is traced and connected to an act or agency that is the defendant's responsibility." McDonnell v. Montgomery Ward & Co., 121 Vt. 222, 229, 154 A. 2d 469 (1959).

In this case, in the Court below, the Plaintiff's evidence on the issue

of causation was entirely circumstantial in nature. The only witness who could have testified and given direct evidence was Plaintiff herself. She testified that she did not know why she fell or what, if anything, caused her to fall. Her testimony and that of all other witnesses was entirely circumstantial on the issue of causation.

In speaking to the issue of the sufficiency of circumstantial evidence to establish causation, the Vermont Supreme Court has said, "When the liability rests entirely upon circumstantial evidence, the circumstances when taken together must reasonably tend to support the inference." Wellman, Admr. v. Wales, 97 Vt. 245, 253, 122 A. 659 (1923). The Court in Wellman further stated, "The conclusion from the facts offered must be at least the more probable hypothesis, with reference to the possibility of other hypotheses. (Emphasis added) Wellman, supra, at 253.

The Vermont rule is consistent with the general law on the subject. 30 AmJur 2d "Evidence" §1121, pp. 288 & 289 provides,

"To prove proximate cause by circumstantial evidence, proof of a mere possibility of causation is not sufficient; the circumstances adduced must render reasonably probable the existence of such fact. The evidence must not leave the causal connection a matter of conjecture; it must be something more than consistent with plaintiff's theory as to how the accident occurred. Where the proof of causal connection is equally balanced, or the facts are as consistent with one theory as with another, plaintiff has not met the burden which the law casts upon him. If the evidence shows that an injury may have resulted from one of several causes, but only one of the causes can be attributed to the defendant's negligence, the plaintiff must fail. In other words, if the cause of the injury may be reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of proving that his injury is the direct result of the defendant's negligence."

The evidence at trial tended to show the Plaintiff went to the cash register and inquired of the cashier the location of the Ladies Room. She was informed it was upstairs to her right. Plaintiff stated she turned to her right and fell. She was most equivocal on whether or not she had actually taken even one step before she fell. She was totally unable to state why or what caused her to fall even under questioning by the Court. (T. p. 115).

The step or riser relied upon in Plaintiff's theory of liability as the agency of Defendant's negligence was located to her right when standing before the cashier. This riser lay in her proposed path of travel, but no evidence was introduced that she ever reached a point where the riser might have impeded her progress to the Ladies Room. The only evidence bearing, even indirectly, on this point was provided by Mr. Valentino who said she was lying "near" the step or riser. (T. p. 53).

The undisputed evidence shows that Plaintiff had had a prior fall down steps, unrelated to this incident, that had resulted in a severe injury to her right ankle. (T. p. 64). Her testimony was that she turned right. She stated she merely turned right and fell. This state of the evidence is equally or more consistent with her ankle collapsing which caused her to fall as it is with her tripping over a step or riser which would logically require her to take at least one step. Further, the evidence does not show she ever reached the riser.

Upon this state of the record the trial court should have granted Defendant's request for a directed verdict. Plaintiff had failed to show that her theory of causation was the more probable hypothesis, having reference to the other hypotheses in light of the Wellman case, above. Plaintiff had failed

in her burden of proof. Submission of the case to the jury on this state of the evidence allowed the jury to speculate and engage in conjecture on a most critical issue, causation, all to Defendant's great detriment and prejudice. Allowing a jury to speculate or engage in conjecture in reaching its verdict is condemned. Milne v. Edson, 116 Vt. 226, 73 A. 2d 325 (1950).

ARGUMENT II: FOR THE JURY TO HAVE FOUND FOR THE PLAINTIFF IT WOULD HAVE HAD TO BASE AN INFERENCE UPON AN INFERENCE WHICH IS NOT PERMITTED.

It is Defendant's position that the law of Vermont applies in this case since it is based on diversity and not upon a federal statute. This is the rule recognized and followed in Crown Cork & Seal Co. v. Morton, 417 F 2d 921 (6th Cir. 1969).

It is the rule in Vermont that no inference can be based or founded upon a fact the existence of which must itself be inferred. Poronto v. Sinnott, 89 Vt. 479, 95 A 647 (1915). It follows that a verdict may not be founded upon reasoning which requires an inference upon an inference. Vermont law does permit parallel inferences. Huestis v. Lapham, 113 Vt. 191, 32 A 2d 115 (1943), Capello's Admr. v. Aero, 116 Vt. 64, 68 A 2d 913 (1949), Ackerman v. Kogut, 117 Vt. 40, 84 A 2d 131 (1951), State v. Fox, 123 Vt. 82, 181 A 2d 74 (1962).

The evidence shows that Plaintiff could not say and did not know why or what caused her to fall. A riser existed and she was found near the riser but not on or beyond it.

The mechanical application of Vermont law to the facts of the instant case follows:

TESTIMONIAL FACT

Plaintiff's testimony that she fell but did not know how she came to fall.

Mr. Valentino's testimony, assuming the inferred fact above that Plaintiff tripped over something under the control of the defendant, that at a time chronologically removed from the accident, he could find nothing in the area over which Plaintiff could have tripped other than the riser.

INFERRED "FACT"

Plaintiff tripped over some object under the control of the defendant.

Therefore, Plaintiff tripped over the riser.

The inference based on an inference arises because witness Mr. Valentino required, as a part of his "testimonial" fact, the fact ultimately inferred from Plaintiff's testimony rather than facts observable to him.

Moreover, the evidence reveals that Plaintiff did not see the riser. She cannot both argue that she did not see the riser and convincingly testify from her own personal observation that the area was free of other objects, whether or not under the control of the defendant, over which she might have tripped. Mr. Valentino's testimony is thus necessary to establish the fact that there was no other object over which Plaintiff might have tripped, and he was called in an attempt to do so. His testimony necessarily depends, however, on the inferred fact that Plaintiff Mrs. Valentino must have tripped over something.

Mr. Valentino was concededly not present at the time of the fall. He further testified that when he first arrived upon the scene of the accident, he did not look for other objects. (T. p. 137). Assuming arguendo that the record supports an inference that Mr. Valentino's testimony shows the area

was clear, this is not enough, for his testimony would support only the inference that the area was clear at the time he looked for other objects. A second inference is required to establish that the area was clear of objects over which the plaintiff could have tripped, other than the riser, at the time of her fall. For the above reasons, the Court below should have granted Defendant's Motion for a Directed Verdict at the close of Plaintiff's case and, failing that, at the close of the evidence.

ARGUMENT III: THE DISTRICT COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE.

Defendant requested a directed verdict both at the close of Plaintiff's case and at the close of the evidence. (T. pp. 143-144, 154). By referring to the "maintenance of an unreasonable situation" the issue of Plaintiff's contributory negligence is raised. (T. pp. 143-144).

Despite the fact that there was substantial evidence of contributory negligence, the motion was denied. Plaintiff acknowledges that she was told the Ladies Room was "upstairs," which stairs she saw. (T. p. 93). She was looking in the direction of the riser complained of but failed to see it. (T. p. 114, 117).

Under Vermont law, Plaintiff was charged with a duty to keep a look-out for that which is there to be seen. See Wall v. A. N. Derringer, Inc., 119 Vt. 36, 117 A 2d 390 (1955), also a one-riser fall case upholding a judgment notwithstanding the verdict in favor of the Defendant on similar facts.

Defendant believes that the trial Court misunderstood Vermont law when it failed to even consider the possibility of a directed verdict on a contributory negligence basis on the ground that this case presented a comparative negligence rather than a contributory negligence situation. (T. p. 154).

Title 12 V.S.A. §1036 states that "contributory negligence shall not bar recovery if Plaintiff's negligence was not greater than . . ." that of the Defendant. Therefore, in every case involving negligence on the part of a Plaintiff which exceeds the negligence of the Defendant, contributory negligence is a defense, and the comparative negligence issue does not arise. This is the very situation in which the direction of a verdict for the Defendant would be proper.

It is well settled in Vermont that the issue of contributory negligence may properly be taken from the jury's consideration in the proper case.

Wall v. A. N. Derringer Co., supra.

The Court advised counsel that this was a "close case," (T. p. 146, 154) but let the case go to the jury. For the Court to have done so under the mistaken belief that the comparative negligence rule precluded him from directing a verdict based upon contributory negligence was highly prejudicial to the Defendant.

CONCLUSION

For the reasons stated above, Defendant respectfully prays this Honorable Court reverse the decision of the District Court and enter judgment for the Defendant.

Respectfully submitted,

Swiss Fondue Pot, Inc. - Appellant
By Its Attorneys
McKee, Giuliani & Cleveland

By: 

W. Edson McKee